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Opinion No. 08-79

Proposed Amendment of Chapters 3, 4 and 7 of Title 13 of the Tennessee Code

QUESTIONS

1. The General Assembly is currently considering proposed amendments to Chapters 3, 4 and 7 of Title 13 of the Tennessee Code. Sections 1, 2, 5, 6, 9 and 10 of Senate Bill 2947 (as amended) generally propose to add another factor or circumstance for a planning commission to consider in its effort to make and adopt a general plan for the physical development of the territory of the region for which it is responsible. The additional circumstance is "the identification of areas where there are inadequate or nonexistent publicly or privately owned and maintained services and facilities when the planning commission has determined such services are necessary in order for development to occur." The first question presented is the following: Could the identification of such areas by a planning commission lead to inverse condemnation claims against the governmental entity served by the planning commission?

2. Sections 4 and 8 of Senate Bill 2947 (as amended) propose to change existing law concerning the process of amending a general regional plan. Under existing law the planning commission has "the function and duty . . . to make and adopt a plan for the physical development of the territory" of its region and "may from time to time amend, extend or add to the plan." Sections 4 and 8 of this bill (as amended) propose to change this amendment process by authorizing the local legislative body to also initiate amendments to the general regional plan. The second question presented is the following: Does allowing a local legislative body to initiate an amendment to a region's general plan conflict with current state law placing that authority on such region's planning commission?

OPINIONS

1. No. While there is no established formula for determining when a governmental regulation of land use becomes a compensable taking, a "categorical" or per se taking may be found in the following instances: (1) when a property owner is forced to suffer a permanent physical occupation of his property by the government, regardless of the minimal economic impact on the property; and (2) when a property owner is deprived of all economically viable use of his property. The identification of areas of a planning region where there are inadequate or nonexistent publicly or privately owned and maintained services and facilities when the planning commission has determined such services are necessary in order for development of those identified areas to occur would neither force an affected property owner to suffer a permanent physical occupation of his property by the government nor deprive an affected property owner of all economically viable use

of his property. Accordingly, there would be no basis for an inverse condemnation claim asserted by an affected property owner as a result of the mere identification of the area in which his property is located as an area of a planning region where there are inadequate or nonexistent publicly or privately owned and maintained services and facilities when the planning commission has determined such services are necessary in order for development to occur.

2. The plain language of Sections 4 and 8 of Senate Bill 2947 (as amended) expresses a legislative intent to change existing law concerning the process of amending a general regional plan. The enactment of Sections 4 and 8 would change existing law to modify the process of amending a general regional plan by authorizing both a planning commission and a local legislative body to initiate such amendments to the regional plan. This office has found no conflict between the existing "amendment" process and the one proposed by this bill as amended, as Sections 4 and 8 simply grant the authority to initiate an amendment to a regional plan to two local bodies instead of one. The authority of a planning commission to initiate an amendment to its regional plan remains. If the General Assembly intends to enact this change in existing law but is concerned that some of the "adoption" provisions of the existing Chapters 3 and 4 of Title 13 appear to conflict with the plain language of the proposed statutory amendments, the General Assembly has the opportunity to resolve those apparent conflicts prior to the enactment of these statutory amendments.

ANALYSIS

1. **Local Land Use Regulation:** Local governments in Tennessee lack the inherent authority to control the use of land within their boundaries. *Family Golf of Nashville, Inc. v. Metropolitan Gov't of Nashville,* 964 S.W.2d 254, 257 (Tenn.Ct.App.1997). Such power resides with the State of Tennessee, and whatever authority local governments have to control the use of land within their territories has been delegated by the General Assembly to local governments. *Id.* The General Assembly has the prerogative to decide when and how that authority will be exercised, subject only to the limitations in the state and federal constitutions. *Motlow v. State*, 125 Tenn. 547, 589-90, 145 S.W. 177, 188 (1911).

Chapters 3, 4 and 7 of Title 13 of the Tennessee Code Annotated delegate the authority of the State of Tennessee to local governments to regulate land use through local planning and zoning. Regional planning commissions are created and operate under Tenn. Code Ann. §§ 13-3-301, *et seq*. Under that statutory scheme, the Tennessee Department of Economic and Community Development may create and establish planning regions and define the boundaries of each region. Tenn. Code Ann. § 13-3-102. Generally, a regional planning commission is required to make and adopt a general regional plan for the physical development of the territory of the region for which it is responsible. Tenn. Code Ann. § 13-3-301(a). Once a regional planning commission has adopted and filed its plan with the county register of the county or counties that lie in whole or in part in the region, then the regional planning commission must approve any plat of a subdivision of land within the region before the plat may be filed with the county register. Tenn. Code Ann. § 13-3-402.

A regional planning commission is also authorized to certify to the legislative body of a county located in whole or in part in the region a zoning plan, including the text of a zoning

ordinance. Tenn. Code Ann. § 13-7-102. The county may then enact zoning ordinances under Tenn. Code Ann. § 13-7-104. Once a regional planning commission has adopted a zoning plan, no local government - either a city or a county - may adopt a zoning ordinance with respect to territory in the regional planning area without first submitting the ordinance to the regional planning commission. *See* Op. Tenn. Att'y Gen. 99-150 (August 16, 1999), and Tenn. Code Ann. § 13-7-102.

Under Tenn. Code Ann. § 13-3-102, the Department of Economic and Community Development may designate the municipal planning commission of each city as a regional planning commission with respect to territory outside its boundaries. When designated as a regional planning commission under this statute, a municipal planning commission carries out the role given a regional planning commission with respect to that territory.

The county legislative body of any county is empowered, in accordance with the conditions and the procedure specified in Chapter 7, to "regulate . . . the uses of land for trade, industry, residence, recreation, agriculture, forestry, soil conservation, water supply conservation or other purposes. . ." Tenn. Code Ann. § 13-7-101(a)(1). The pertinent provision of section 13-7-102 provides that "the county legislative body may, by ordinance, . . . divide the territory of the county which lies . . . outside of municipal corporations into districts . . . and within such districts may regulate the erection, construction, reconstruction, alteration and uses of buildings and structures and the uses of land." Tenn. Code Ann. § 13-7-102. Although the county legislative body has the power to amend zoning ordinances, the amendment must first be submitted to the regional planning commission. *Id*. Without prior submission, the amendment is of no effect. *Id*. The planning commission's authority is limited to approval, disapproval, or suggestions, and if the planning commission disapproves, the proposal may nevertheless be considered and approved by the county legislative body. *Id*.

Zoning and planning are complementary pursuits that are largely concerned with the same subject matter. *Family Golf of Nashville, Inc.*, 964 S.W.2d at 257. They are not, however, identical fields of municipal endeavor. *Id.* Planning involves coordinating the orderly development of all interrelated aspects of a community's physical environment as well as all the community's closely associated social and economic activities. *Id.* The general purpose of regional planning is found at Tenn. Code Ann. § 13-3-302:

> The regional plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, efficient and economic development of the region which will, in accordance with present and future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and welfare of the inhabitants, as well as efficiency and economy in the process of development, including, among other things, such distribution of population and of the uses of the land for urbanization, trade, industry, habitation, recreation, agriculture, forestry and other uses as will tend to create conditions favorable to transportation, health, safety, civic activities and educational and cultural opportunities, reduce the wastes of financial

> and human resources which result from either excessive congestion or excessive scattering of population, and tend toward an efficient and economic utilization, conservation and production of the supply of food, water, minerals, drainage, sanitary and other facilities and resources.

Zoning, on the other hand, involves the territorial division of land into districts according to the character of the land and buildings, their suitability for particular uses, and the uniformity of these uses. *Family Golf of Nashville, Inc.*, 964 S.W.2d at 258.

Title 13 of the Tennessee Code places the authority to plan and the authority to zone with different local governmental entities. Planning is entrusted to appointed municipal or regional planning commissions. *See* Tenn. Code Ann. §§ 13-3-101, 13-4-101. In contrast, the zoning power is squarely placed in the hands of the local legislative bodies because the power to zone is viewed as essentially a legislative exercise of the government's police power. *See Holdredge v. City of Cleveland*, 218 Tenn. 239, 247-48, 402 S.W.2d 709, 712 (1966). Local legislative bodies may enact zoning plans recommended by planning commissions, but they are not obligated to. *See* Tenn. Code Ann. §§ 13-7-102 and 13-7-202. Local legislative bodies may also amend zoning ordinances; however, they must submit proposed changes to the planning commission for review. If the planning commission disapproves of a proposed change, a majority of the membership of the local legislative body must approve the proposed change in order for it to be valid. *See* Tenn. Code Ann. §§ 13-7-105(a), 13-7-203(b), and 13-7-204. Accordingly, the General Assembly has delegated authority to the local legislative bodies to make final decisions on all zoning matters. *See State ex rel. SCA Chem. Servs., Inc. v. Sanidas*, 681 S.W.2d 557 (Tenn. Ct. App. 1984).

2. **Inverse Condemnation (Regulatory Taking) Issue:** Sections 1, 2, 5, 6, 9 and 10 of Senate Bill 2947 (as amended) generally propose to add another factor or circumstance for a planning commission to consider in its effort to make and adopt a general plan for the physical development of the territory of the region for which it is responsible. The additional circumstance is "the identification of areas where there are inadequate or nonexistent publicly or privately owned and maintained services and facilities when the planning commission has determined such services are necessary in order for development to occur." Could the identification of such areas by a planning commission lead to inverse condemnation claims against the governmental entity served by the planning commission?

This office has previously opined that a state regulation that affects the value, use or transfer of private property may constitute a taking if the regulation: (1) denies the landowner all economically viable use of his property or substantially interferes with his reasonable investment-backed expectations; (2) is not reasonably related or roughly proportional to the projected impact of the landowner's proposed use of the property; or (3) closely resembles or has the effect of a physical invasion or occupation of the private property. Op. Tenn. Att'y Gen. 07-77 (May 22, 2007). Local regulations that affect the value, use or transfer of private property may also constitute a regulatory taking under the foregoing test.

The police power delegated by the General Assembly to local governmental entities authorizes them to regulate land use to protect the health, safety, morals and welfare of the public. *See* Tenn. Code Ann. §§ 13-3-302, 13-7-103, and 13-7-201. While there is no set formula for determining when a government's regulation of land use becomes a compensable taking, and no specific facts have been provided in the instant request, a "categorical" or per se taking may be found in the following instances: (1) when a property owner is forced to suffer a permanent physical occupation of his property, regardless of the minimal economic impact on the property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982); and (2) when a property owner is deprived of all economically viable use of his property, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992).

In establishing regulatory takings doctrine, the United States Supreme Court has applied several factors or tests to determine the constitutionality of government action that effectively denies or limits certain property uses.[1] On the one hand, a statute or ordinance that substantially furthers important public policies such as health, safety and the general welfare may so frustrate distinct investment-backed expectations that it amounts to a taking. Beginning with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158 (1922), the United States Supreme Court explicitly recognized that a police power regulation of private property could be so onerous that it was tantamount to an unconstitutional taking. There, the plaintiff coal company had sold the surface rights to particular parcels of property, expressly reserving the right to mine the coal thereunder. The regulation in question, enacted after these transactions, was a statute prohibiting coal mining that would cause subsidence damage to surface structures. The Court, rejecting the nuisance paradigm established in earlier takings cases, held that the act amounted to an uncompensated taking, primarily due to the magnitude of the loss suffered by the owner of the mining rights. *Id.*, 260 U. S. at 415. The Court concluded that the statute made it commercially impracticable to mine coal and essentially left the mining company with no economic value in the mineral estate. In subsequent cases, however, the Court has allowed certain percentage losses to be tolerated in the name of state police power.

Most regulatory takings challenges today are governed by the three-part test outlined in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646 (1978). In *Penn Central*, the owners of Grand Central Terminal, a designated landmark, were denied approval to build a fifty-five story tower above the terminal, because the alteration would destroy the aesthetic qualities of the building. The Court considered, first, the character of the government's action (*i.e.*, the type of intrusion), the economic impact of the regulation on the property owner, and, finally, the degree to which the regulation interfered with the owner's reasonable investment-backed expectations. *Id.*, 98 S.Ct. at 2659.

As to the nature of the regulation, the Court observed that the government may enact land use laws that adversely affect economic values without resulting in a taking, where, as with zoning laws, the intended purpose is to "enhance the quality of life by preserving the character and desirable aesthetic features" of an area. *Id.*, 98 S.Ct. at 2659-2661. The Court in *Penn Central* then

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[1] *See STS/BAC Joint Venture v. The City of Mt. Juliet*, 2004 WL 2752809 (Tenn. Ct. App. 2004) for a thorough discussion of regulatory takings law.

concluded that, while the law prevented plaintiff from using certain features of the airspace above the building for expansion, it in no way interfered with plaintiff's present use of the terminal itself, nor did it prevent Penn Central from realizing a reasonable return on its investment. *Id.*, 98 S.Ct. at 2665. This case and later cases applying an economic viability test stand for the proposition that diminished value should be measured in reference to the property "as a whole" and not simply to the portion affected by the regulation.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232 (1987), the Court was presented with facts almost identical to those sixty years earlier in *Pennsylvania Coal Co. v. Mahon*: an act prohibiting all coal mining in areas where subsidence damage could occur. But this time, the Court held that the act did not constitute a taking and distinguished *Pennsylvania Coal* on the grounds that the statute at issue there appeared to have been enacted solely for the benefit of private parties, while the law in *Keystone* was intended to regulate a public nuisance and was in the best interests of the general welfare. *Id.*, 107 S.Ct. at 1242. Invoking the *Penn Central* test, the majority also noted that the regulation did not completely prevent the plaintiff from mining coal on any parcel of land. *Id.* In fact, the percentage loss in economic terms was minimal. As the Court stated, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.*, 107 S.Ct. at 1248, quoting *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 326-327 (1979).

More recently, the Supreme Court addressed the issue of temporary takings, holding that regulations that work a temporary taking must be examined on the facts of each case. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465 (2002), the Court amplified and explained some earlier decisions with respect to "categorical" takings and compensation for temporary takings. Specifically, the Court held that, in analyzing the economic impact of a regulation, the concept of "the parcel as a whole" is defined by both dimensions of a real property interest: the metes and bounds geographic dimension and the temporal aspect, which describes the terms of years of the owner's interest in the land. The determination of a regulatory taking "is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'" *Id.*,122 S.Ct. at 1484. In sum, a permanent deprivation of use is a taking of the parcel as a whole, but a temporary restriction (in this case on development) that causes a diminution in value is not, because the property will recover value once the restriction is lifted. *Id.*

A takings analysis under the Tennessee Constitution generally follows the same principles as those set forth above. The Tennessee Supreme Court has, however, taken a more expansive view of takings in some circumstances. One example relates to a taking asserted under the physical invasion theory as it pertains to repeated overflights and aviation easements. In *Jackson v. Metropolitan Knoxville Airport Authority*, 922 S.W.2d 860 (Tenn. 1996), the court rejected a line of federal case law that required direct overflights or a direct physical invasion to constitute a taking and, instead, ruled that a plaintiff must merely allege substantial interference with the use and enjoyment of property from flights that pass close to private land but not directly overhead.

There is no established formula for determining when a governmental regulation of land use

becomes a compensable taking, but the United States Supreme Court has recognized that a "categorical" or per se taking may be found in the following instances: (1) when a property owner is forced to suffer a permanent physical occupation of his property by the government, regardless of the minimal economic impact on the property; and (2) when a property owner is deprived of all economically viable use of his property. An action taken by a planning commission to merely identify areas of a planning region where there are inadequate or nonexistent publicly or privately owned and maintained services and facilities when the planning commission has determined such services are necessary in order for development of those identified areas to occur would neither force an affected property owner to suffer a permanent physical occupation of his property by the government nor deprive an affected property owner of all economically viable use of his property. Accordingly, there would be no legal basis for an inverse condemnation claim to be asserted by an affected property owner under those circumstances.

3. **Regional Plan Amendment Issue:** Sections 4 and 8 of Senate Bill 2947 (as amended) propose to change existing law concerning the process of amending a general regional plan. Under existing law the planning commission has "the function and duty . . . to make and adopt a plan for the physical development of the territory" of its region and "*may* from time to time amend, extend or add to the plan." (emphasis added). Sections 4 and 8 of this bill (as amended) propose to change this amendment process by authorizing the local legislative body to also initiate amendments to the general regional plan. Does allowing a local legislative body to initiate an amendment to a region's general plan conflict with current state law placing that authority on such region's planning commission?

Tenn. Code Ann. §§ 13-3-303 and 13-4-201 currently provide that a planning commission "*may* from time to time amend, extend or add to the (regional or municipal) plan or carry any part of the plan into greater detail." (emphasis added). The foregoing statutes provide the existing authority of a planning commission to amend its general plan for the physical development of the territory of its region.

Sections 4 and 8 of Senate Bill 2947 (as amended) propose to amend Tenn. Code Ann. §§ 13-3-304 and 13-4-202 to grant a local legislative body authority to initiate an amendment of the general plan of its region and, after review by the planning commission, adopt the amendment initiated by the local legislative body. Sections 4 and 8 provide in pertinent part that:

> [T]he general regional plan may be amended upon recommendation by and certification of the amendment by the planning commission and adoption of that recommendation by the legislative body. The general regional plan may also be amended upon initiative of the legislative body. Such initiative must be transmitted, in writing, to the planning commission who must be afforded an opportunity to review and vote on the initiative of the legislative body. The planning commission's recommendation on the amendment must then be transmitted to the legislative body who may then adopt the amendment.

This office has found no conflict between the existing "amendment" process and the one proposed by Sections 4 and 8, as Sections 4 and 8 of Senate Bill 2947 (as amended) simply grant the authority to initiate an amendment to a regional plan to two local bodies instead of one. The authority of a planning commission to initiate an amendment to its regional plan remains.

Article II, § 3 of the Tennessee Constitution vests all legislative authority in the General Assembly. Although the constitution does not specifically define the powers of the General Assembly, the Tennessee Supreme Court has stated that "[t]he legislative branch has the authority to make, alter, and repeal the law. . . ." *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995). Of further significance is the fact the "General Assembly's power to enact laws is limited only by the explicit and implicit restrictions in the Constitution of Tennessee and the United States Constitution." *Mayhew v. Wilder*, 46 S.W.3d 761, 784 (Tenn.Ct.App.2001).

The plain language of Sections 4 and 8 of Senate Bill 2947 (as amended) expresses the legislative intent of the General Assembly to change existing law concerning the process of amending a general regional plan. The enactment of Sections 4 and 8 would modify the process of amending a general regional plan by authorizing both a planning commission and a local legislative body to initiate such amendments to the regional plan.

If the General Assembly intends to enact this change in existing law but is concerned that some of the "adoption" provisions of the existing Chapters 3 and 4 of Title 13 appear to conflict with the plain language of the proposed statutory amendments, the General Assembly has the opportunity to resolve those apparent conflicts prior to the enactment of these statutory amendments.

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